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Opinion following transfer from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. WUENDY M. MAGANA et al., Defendants and Appellants.	B280357 (Los Angeles County Super. Ct. No. PA083962)

APPEALS from judgments of the Superior Court of Los Angeles County, Daniel B. Feldstern, Judge. Affirmed.

Karyn H. Bucur, under appointment by the Court of Appeal, for Defendant and Appellant Wuendy M. Magana.

William L. Heyman, under appointment by the Court of Appeal, for Defendant and Appellant Maria Clemencia Estrada.

Xavier Becerra, Attorney General, Lance E. Winters, Gerald A. Engler, Chief Assistant Attorneys General, Susan Sullivan Pithey, Zee Rodriguez, Acting Supervising Deputy

Attorneys General, Noah P. Hill and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

Wuendy M. Magana and Maria Clemencia Estrada each pleaded no contest to one count of transporting more than four kilograms of a controlled substance in violation of Health and Safety Code sections 11352, subdivision (a), and 11370.4, subdivision (a)(2), and were sentenced to a split term of three years in county jail and five years of mandatory supervision. On appeal Magana and Estrada contend the condition of mandatory supervision authorizing unlimited searches of their electronic devices, including smart phones, is unconstitutionally overbroad. In a nonpublished opinion filed May 14, 2019 we rejected Magana and Estrada's overbreadth challenge and affirmed the judgments.

Magana's and Estrada's petitions for review were granted by the Supreme Court in July 2019, but further action was deferred pending consideration of a related issue in *In re Ricardo P.*, review granted February 17, 2016, S230923, which involved the question whether an electronic search condition imposed as a condition of probation in a juvenile wardship proceeding was reasonably related to the juvenile's "future criminality" within the meaning of *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*). A divided Supreme Court decided *In re Ricardo P.* on August 15, 2019, holding, based on the record before it, the electronic search condition was not reasonably related to future criminality and was therefore invalid. (*In re Ricardo P.* (2019) 7 Cal.5th 1113, 1128 (*Ricardo P.*).) The Court majority did not reach the question of unconstitutional overbreadth. (See *id.* at p. 1118.)

Following its decision in *Ricardo P.* the Supreme Court transferred Magana and Estrada's case to us with directions to vacate our prior decision and to reconsider the case in light of its decision in *Ricardo P.* (*People v. Magana* (Oct. 23, 2019, S256289) [2019 Cal. Lexis 7988].) Estrada and the Attorney General have submitted supplemental letter briefs. Magana filed a belated joinder in Estrada's supplemental brief. We again affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Los Angeles County Sheriff's Deputy John Leitelt conducted a traffic stop of an SUV in the area of Interstate 5 north of Castaic on the afternoon of July 22, 2015. Magana was in the driver's seat; Estrada in the front passenger seat. After receiving permission to search the vehicle, Leitelt opened a black suitcase in the rear storage area of the SUV and found five wrapped packages that contained a total of 4.992 kilograms of cocaine. Leitelt also found four cell phones in the SUV.

Magana and Estrada were charged with the sale or transport of a controlled substance (Health & Saf. Code, § 11352, subd. (a)), with a special allegation that the weight of the controlled substance exceeded four kilograms (Health & Saf. Code, § 11370.4, subd. (a)(2)). After initially pleading not guilty and prior to a hearing on a motion to suppress evidence (Pen. Code, § 1538.5), Magana and Estrada each pleaded no contest to the charge of transporting a controlled substance and admitted the special allegation that the controlled substance exceeded four kilograms by weight.

At the sentencing hearing on October 4, 2016 the court denied probation and sentenced both Magana and Estrada to eight-year terms in county jail (the lower term of three years for

the substantive offense plus five years for the weight enhancement), but suspended execution of five years on each sentence, placing them instead on mandatory supervision for five years pursuant to Penal Code section 1170, subdivision (h)(5).[1] One of the conditions of mandatory supervision imposed by the court is that Magana and Estrada "submit their person and property to search and seizure at any time of the day or night by any probation officer or other peace officer, with or without a warrant, probable cause, or reasonable suspicion. And this search and seizure condition involves their person, residence, vehicles, electronic information, and personal belongings. And [as to the] property subject to search and seizure, which includes any electronic devices owned or possessed by the defendants, they are consenting to provide passwords and any access to those phones or other electronic devices as a condition of this search and seizure. And that's pursuant to California Electronics Communication Privacy Act."[2]

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[1] Magana and Estrada were each awarded eight days of presentence custody credit.

[2] The search condition as recorded in the court's minute orders is slightly different: "[S]ubmit your person and property to search and seizure at any time of the day or night, by any probation officer or other peace officer, with or without a warrant, probable cause or reasonable suspicion. [¶] As part of your supervision, whether probation, mandatory supervision, community supervision or parole, you will be required to submit your person, residence, vehicle, electronic information, and personal belongings to search or seizure, at any time of the day or night, with or without probable cause by any law enforcement officer. You will also be waiving all rights under the Electronic Communications Privacy Act specified in Penal Code section 1546

Neither Magana nor Estrada objected to any of the conditions imposed by the court for the five-year period of mandatory supervision.

DISCUSSION

1. *Conditions of Probation and Ricardo P.*

   a. *Statutory and constitutional limits on probation conditions*

A sentencing court "has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) Penal Code section 1203.1, subdivision (j), authorizes the sentencing court to impose conditions on a criminal defendant released on probation that are "fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer." The conditions the court may impose, however, are not unlimited: "'[A] condition of probation must serve a purpose specified in the statute,' and conditions regulating criminal conduct must be "'reasonably related to the crime of which the defendant was convicted or to future criminality.'"" (*People v. Moran* (2016) 1 Cal.5th 398, 403.)

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through 1546.4 for the duration of your supervision period." The court's oral pronouncement of the condition, which included the requirement that Magana and Estrada provide passwords for their electronic devices, controls over the clerk's minute order. (See *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Mullins* (2018) 19 Cal.App.5th 594, 612.)

Explaining the statutory limits on conditions of probation in *Lent*, *supra*, 15 Cal.3d 481, the Supreme Court held "[a] condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation; fn. omitted.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*Id.* at p. 486.) The *Lent* test is conjunctive: "'[E]ven if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality.'" (*People v. Moran*, *supra*, 1 Cal.5th at p. 403.)

In addition to the statutory limits on the court's discretion to impose probation conditions, "[a] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*).) "'The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.'" (*People v. Appleton* (2016) 245 Cal.App.4th 717, 723, quoting *In re E.O.* (2010) 188 Cal.App.4th 1149, 1153; see *Williams v. Garcetti* (1993) 5 Cal.4th 561, 577 ["[t]he overbreadth

doctrine provides that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom'"].)

b. *Ricardo P. and the third prong of the Lent test*

Ricardo P. concerned a juvenile defendant who was placed on probation after admitting he had committed two residential burglaries. Because Ricardo had told a probation officer that smoking marijuana did not allow him to think clearly, the juvenile court imposed as conditions of probation that Ricardo submit to drug testing, not use illegal drugs or alcohol and not associate with people Ricardo knew to use or possess illegal drugs. As an additional condition of probation the court required Ricardo to permit warrantless searches of his electronic devices, including any electronic accounts that could be accessed through those devices. Ricardo challenged the electronics search condition, arguing it was not reasonably related to the crimes he had admitted committing or to preventing future criminal conduct. Although neither electronic devices nor social media had been used in connection with the burglaries, the juvenile court justified its imposition of the condition as enabling probation officers to monitor Ricardo's compliance with the drug-related probation conditions because, the court observed, teenagers tend to brag about drug use online. (*Ricardo P.*, *supra*, 7 Cal.5th at pp. 1116-1117.)

Ricardo appealed, arguing the electronics search condition was unreasonable under *Lent* and unconstitutionally overbroad. The court of appeal rejected Ricardo's argument under *Lent*, finding the search condition reasonably related to effective supervision of his compliance with the various drug-related

conditions of probation. (*Ricardo P.*, *supra*, 7 Cal.5th at p. 1117.) But the court held the condition overbroad because it did not limit the types of data on, or accessible through, his cell phone that could be searched. (*Ibid.*) The court suggested a probation condition limited to emails, text and voicemail messages, photographs and social media accounts would be constitutional. (*Ibid.*)

The Supreme Court granted review limited to the question whether the electronics search condition imposed by the juvenile court satisfied *Lent*. (*Ricardo P.*, *supra*, 7 Cal.5th at p. 1118.) More specifically, presupposing the first and second *Lent* requirements had been satisfied, the Court considered whether the electronics search condition was reasonably related to future criminality and concluded it was not, "because the burden it imposes on Ricardo's privacy is substantially disproportionate to the condition's goal of monitoring and deterring drug use." (*Ricardo P.*, at p. 1120; see *id.* at p. 1122 [the third prong of *Lent* "contemplates a degree of proportionality between the burden imposed by a probation condition and the legitimate interests served by the condition"].)[3]

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[3] Although *Lent* involved an adult probationer, the Supreme Court agreed with the consistent holdings of courts of appeal that juvenile probation conditions must be judged by the same three-part standard. (*Ricardo P.*, *supra*, 7 Cal.5th at pp. 1118-1119.) However, the court also recognized, given the purposes of juvenile wardship proceedings, a condition of probation that is impermissible for an adult offender is not necessarily unreasonable for a juvenile under the supervision of the juvenile court. (*Id.* at p. 1118.)

The Court, in an opinion by Justice Liu, joined by Justices Cuéllar, Kruger and Groban, explained *Lent*'s third prong requires more than an abstract or hypothetical relationship between a probation condition and deterring future criminality conduct by the probationer (*Ricardo P.*, *supra*, 7 Cal.5th at pp. 1120-1121), noting, "In virtually every case, one could hypothesize that monitoring a probationer's electronic devices and social media might deter or prevent future criminal conduct." (*Id.* at p. 1123.) Moreover, quoting from the United States Supreme Court's decision in *Riley v. California* (2014) 573 U.S. 373 [134 S.Ct. 2473, 189 L.Ed.2d 430] (*Riley*), which held the search-incident-to-arrest exception to the general prohibition of warrantless searches does not apply to cell phones,[4] and noting that the search condition at issue could permit access not only to social media, emails and text messages but also to private financial and health information, the Court stressed that requiring Ricardo to submit all of his electronic devices and passwords to search at any time imposed a very heavy burden on privacy with a very limited justification. (*Ricardo P.*, at pp. 1123-1124.)

The Court made clear its holding "does not categorically invalidate electronics search conditions" (*Ricardo P.*, *supra*, 7 Cal.5th at p. 1128), recognizing that "[i]n certain cases, the probationer's offense or personal history may provide the juvenile court with a sufficient factual basis from which it can determine

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[4] The Supreme Court in *Riley* reasoned that most cell phones are now "minicomputers that also happen to have the capacity to be used as a telephone" that "differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." (*Riley*, *supra*, 573 U.S. at p. 393.)

that an electronics search condition is a proportional means of deterring the probationer from future criminality" (*id.* at pp. 1128-1129).

In a dissenting opinion the Chief Justice, joined by Justices Chin and Corrigan, agreed the electronics search condition imposed on Ricardo swept too broadly relative to its rationale, but as a matter of unconstitutional overbreadth, not under the requirements of *Lent* as properly understood: "Under our precedent, search conditions generally have been recognized as "'reasonably related to future criminality"' [citation], thereby satisfying *Lent*, without the additional proportionality assessment that the majority requires [citation]. Reserving closer scrutiny of a search condition for the subsequent overbreadth step of appellate review properly recognizes the broad discretion generally accorded to the trial courts and especially juvenile courts in crafting appropriate conditions of probation. At the same time, it vindicates the principle that probation conditions that implicate constitutional rights and on that basis merit closer review must be properly tailored to the justifications behind them." (*Ricardo P.*, *supra*, 7 Cal.5th at p. 1130 (dis. opn. of Cantil-Sakauye, C. J.).)

2. *Magana and Estrada Have Not Forfeited Their Facial Overbreadth Challenge to the Electronics Search Condition*

In most cases the failure to object to a condition of probation or mandatory supervision forfeits the issue for appellate review. (See *People v. Welch* (1993) 5 Cal.4th 228, 234-235 [failure to object to the reasonableness of a probation condition precludes the defendant from raising the challenge on appeal]; accord, *People v. Moran*, *supra*, 1 Cal.5th at p. 404,

fn. 7.)[5] This forfeiture rule applies to constitutional challenges to probation conditions if the constitutional question cannot be resolved without reference to the sentencing record developed by the trial court. (*Sheena K.*, *supra*, 40 Cal.4th at p. 889.) However, in *Sheena K.* the Supreme Court held a constitutional challenge to a probation condition based on vagueness or overbreadth may be reviewed on appeal if it presents an error that is "a pure question of law, easily remediable on appeal by modification of the condition." (*Id.* at pp. 888-889.)

As discussed, unlike Ricardo, Magana and Estrada did not object to the electronics search condition in the trial court. To the extent they raise a facial challenge to the constitutional validity of that condition, their claim has not been forfeited. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 888-889.) However, we address only the constitutionality of the challenged condition on its face, not whether it is reasonable as applied to Magana or Estrada as a matter of constitutional law or within the meaning of *Ricardo P.* and *Lent*.

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[5] Mandatory supervision following a county jail commitment, imposed under Penal Code section 1170, subdivision (h), "is akin to a state prison commitment; it is not a grant of probation or a conditional sentence." (*People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1422; accord, *People v. Martinez* (2014) 226 Cal.App.4th 759, 763.) Nonetheless, it is similar to probation in the sense that the terms and conditions of the defendant's release are ordered by the court at the sentencing hearing. Thus, the rationale for the rule of forfeiture applies equally to the trial court's order imposing conditions for mandatory supervision.

3. *The Electronics Search Condition Is Not Unconstitutionally Overbroad*

Magana and Estrada acknowledge that cell phones are frequently used in connection with the transportation and sale of cocaine[6] and concede that requiring a defendant convicted of violating Health and Safety Code section 11352, subdivision (a), to permit law enforcement officers to search his or her cell phone as a condition of mandatory supervision serves a legitimate state interest.[7] However, in their initial briefing in this court they emphasized the nature of today's smartphone as a powerful computer containing for many "the privacies of life," as recognized by the United States Supreme Court in *Riley*, *supra*, 573 U.S. at pages 393, 403, and argued the condition imposed by the trial court, by authorizing unlimited searches of their smartphones and other personal electronic devices, rather than restricting permissible searches to data that may be reasonably likely to contain indicia of illegal conduct, was unconstitutionally overbroad, violating their Fourth Amendment right to be free from unreasonable searches and seizures and their right to privacy.[8] In her supplemental letter brief Estrada, although acknowledging the majority opinion in *Ricardo P.* did not address constitutional overbreadth, contends the Court's discussion of the disproportionate, intrusive nature of the electronics search condition there at issue applies equally to overbreadth analysis.

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[6] As discussed, in addition to nearly five kilograms of cocaine, Deputy Leitelt recovered four cell phones from the SUV being driven by Magana.

[7] This concession necessarily means the electronics search condition was reasonably related to the crime for which Magana

Estrada's argument is to some extent correct: Both the third prong of *Lent*, as interpreted in Justice Liu's majority opinion in *Ricardo P.*, and constitutional overbreadth analysis involve an inquiry into proportionality—that is, they both require a court to assess the relative burdens and benefits of a condition of probation or mandatory supervision. (See *Ricardo P.*, *supra*, 7 Cal.5th at p. 1128; *Sheena K.*, *supra*, 40 Cal.4th at p. 890.) But for several reasons an evaluation of the facial challenge to the electronics search condition at issue in this case yields a far different result from the outcome in *Ricardo P.*

First, we properly review the validity of terms of supervised release under standards comparable to those applied to terms of parole, rather than conditions of probation. (*People v. Martinez* (2014) 226 Cal.App.4th 759, 763 [the validity of terms of supervised release should be analyzed "under standards analogous to the conditions or parallel to those applied to terms of parole"]; see *People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1423 ["mandatory supervision is more similar to parole than probation"].) Because parolees have an even more limited

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and Estrada were convicted—the first prong of the *Lent* test. Accordingly, even if Magana and Estrada had preserved an objection under *Lent*, we would not need to apply *Ricardo P.*'s third-prong proportionality analysis to uphold the condition as within the trial court's statutory sentencing discretion. (See *People v. Olguin* (2008) 45 Cal.4th 375, 379 [all three prongs of the *Lent* test must be satisfied before a reviewing court will invalidate a probation term].)

[8] We review de novo a constitutional challenge to a condition of mandatory supervision. (See *People v. Appleton*, *supra*, 245 Cal.App.4th at p. 723; *In re Malik J.* (2015) 240 Cal.App.4th 896, 901.)

expectation of privacy than do probationers (see *Samson v. California* (2006) 547 U.S. 843, 850 [126 S.Ct. 2193, 165 L.Ed.2d 250] ["parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment"]; *People v. Schmitz* (2012) 55 Cal.4th 909, 921 [same]), the impingement on a constitutionally protected interest is far less significant in this case than in *Ricardo P.*

Second, the justification for the electronics search condition in *Ricardo P.* was, at best, strained, as the Supreme Court recognized. (See *Ricardo P.*, *supra*, 7 Cal.5th at pp. 1119-1120 ["[l]ike the Court of Appeal, we 'share some of Ricardo's skepticism' about the juvenile court's inference that he was using drugs at the time he committed the burglaries, as well as the juvenile court's generalization about teenagers' tendency to brag about drug use online"].) Here, in contrast, the connection between cell phone use and the transportation and sale of cocaine is strong. Indeed, Magana and Estrada concede that permitting at least some searches of their electronic devices as a condition of mandatory supervision serves a legitimate state interest.

Third, the electronics search condition in *Ricardo P.* expressly included not only the juvenile's electronic devices but also "any electronic accounts that could be accessed through these devices." (*Ricardo P.*, *supra*, 7 Cal.5th at p. 1115.) No similar language is included in the search condition imposed on Magana and Estrada. Yet it was this additional provision that raised the greatest privacy concern in *Ricardo P.*, prompting the Court to note the plain language of the condition required Ricardo to provide full access to "any other data accessible using electronic devices, which could include anything from banking information

to private health or financial information to dating profiles." (*Id.* at p. 1123.)

In fact, because Magana and Estrada did not object to the electronics search condition in the trial court, we do not know what type of electronic devices they own or possess and whether searching any of those devices would permit access to anything more than emails, text and voicemail messages, call logs and, perhaps, photographs. Their facial challenge to the constitutional validity of that condition cannot be based on assumed facts that might have been, but were not, developed at the time of sentencing. (See *Sheena K.*, *supra*, 40 Cal.4th at p. 885 [facial challenge "requires the review of abstract and generalized legal concepts," not "scrutiny of individual facts and circumstances"]; *People v. Patton* (2019) 41 Cal.App.5th 934, 946 [same].)[9]

Viewing these factors together, unlike the situation in *Ricardo P.* where the electronics search condition imposed a burden that was "substantially disproportionate to the [state's] legitimate interests in promoting rehabilitation and public safety" (*Ricardo P., supra*, 7 Cal.5th at p. 1129), the balance here strongly favors the state's interest in reducing recidivism and protecting the public from future criminal conduct over Magana's

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[9] Even if Magana's and Estrada's electronic devices do permit access to other electronic accounts containing sensitive information such as medical records, they are protected by the principle that a probation search "will not be conducted in an arbitrary, capricious, or harassing manner." (*People v. Schmitz*, *supra*, 55 Cal.4th at p. 923; see *People v. Woods* (1999) 21 Cal.4th 668, 682 [probation search may not be "undertaken in a harassing or unreasonable manner"].)

and Estrada's limited privacy interests. (See *People v. Schmitz*, *supra*, 55 Cal.4th at p. 923 ["[T]he state's interest in supervising parolees is substantial. [Citation.] Parolees "'are more likely to commit future criminal offenses'" [citation] and pose 'grave safety concerns that attend recidivism' [citation; fn. omitted]. Additionally, because of their conditional release into society, parolees have an even greater 'incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal'"]; compare *United States v. Johnson* (9th Cir. 2017) 875 F.3d 1265, 1273 [permitting the warrantless search of a parolee's cell phone] with *United States v. Lara* (9th Cir. 2016) 815 F.3d 605, 612 [applying *Riley* to the warrantless search of a probationer's cell phone].)

DISPOSITION

The judgments are affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

FEUER, J.